No. 96-542

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WALTER MCMILLIAN,
Petitioner,
v.
MONROE COUNTY, ALABAMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a county government is liable under § 1983 for a sheriff's law enforcement decisions, where state law does not vest law enforcement authority in the county government and makes the sheriff a state officer.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the essential attributes of state sovereignty is the prerogative to decide how to allocate governmental authority. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). As the Court noted in *Gregory*, "[t]hrough the structure of its government, and the character of those

who exercise government authority, a State defines itself as sovereign." *Id.* Among the most fundamental decisions a State makes are those regarding whether to vest a particular governmental authority (such as law enforcement) in an entity of local government or in state officials.

While the Court has held that a local government is suable as a "person" under 42 U.S.C. § 1983, even today most counties do not have general home rule powers but serve as administrative arms of their States with only limited authority and revenue raising powers. The members of the Forty-Second Congress were aware of this fact and expressly rejected the imposition of liability on a local government where the State has not granted it authority to act.

The court of appeals' decision correctly recognized that as a prerequisite to holding Monroe County liable for its sheriff's "policymaking," it must first determine whether Alabama has vested law enforcement authority in county governments. After an extensive review of state law, it concluded that Alabama has not done so and that Alabama's sheriffs are executive officers of the State. *See* Pet. App. 3a-19a. This holding is entitled to great deference. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 & n.13 (1986).

County governments frequently have limited fiscal resources. The adoption of petitioner's criteria for imposing liability thus has potentially grave consequences for counties and their ability to provide essential services to their citizens. While petitioner would have this Court disregard the State's sovereign choice in allocating governmental authority, Congress rejected petitioner's liability regime in enacting § 1983. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. A local government is suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State. In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments are suable as "persons" under § 1983. In doing so, the Court relied principally on the common law understanding that the corporation was an artificial person and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The common law understanding recognized, however, that corporations possessed only those powers conferred on them by their charters. As the Court noted in *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870), "[t]he chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter."

This principle applied as well to municipal corporations. *See* John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As a general rule, municipal corporations were not liable when their officers acted "outside of the powers of the corporation." *Id.* § 767, at 725. As the Court has recognized, the members of the Forty-Second Congress, which enacted § 1983, were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

This construction of the term "person" is likewise supported by the debate which culminated in the House of Representatives' rejection of the Sherman Amendment. Numerous representatives recognized that the Amendment, which proposed to provide a cause of action against local

governments for failing to prevent riots and mobs acting with the intent to deprive citizens of their civil rights, was patently unfair because many local governments had not been granted the authority under state law to keep the peace. *See generally* Cong. Globe, 42d Cong., 1st Sess., 791-95 (1871). As the members of the Forty-Second Congress recognized, States are not required to vest law enforcement authority in county governments. Whether they have done so is a question which must be answered before determining whether a particular official is a county's final policymaker.

As this Court has noted, one of the main powers of Alabama county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992). Alabama counties' other principal powers are largely limited to erection of county courthouses, jails, hospitals and other necessary county buildings. *See* Ala. Code § 11-14-10. As the court of appeals recognized, "Monroe County has no law enforcement authority." Pet. App. 18a. It thus properly held that Monroe County was not liable under § 1983 for the sheriff's law enforcement decisions.

2. In challenging the court of appeals' holding that Monroe County could not be held liable for the sheriff's decisions because it does not have law enforcement authority, petitioner argues that it is the common understanding that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law. Contrary to petitioner's suggestion, the sheriff, when acting as a conservator of the peace, has always been viewed as exercising "the sovereignty of the State." 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 6, at 5 (1941). Sheriffs were frequently constitutional officers of the State and remain so today in several States, including Alabama. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27. Sheriffs were commonly subject to removal from office through

either the State's impeachment procedure or removal by the governor or both. Alabama follows this tradition by making its sheriffs members of the State's executive department and subjecting them to impeachment proceedings initiated by the Governor and adjudicated by the state Supreme Court. *See* Ala. Const. art. V, § 112; art. VII, § 174.

None of the criteria which petitioner and his *amici* rely upon to argue that the sheriff exercises county authority, *e.g.*, the method of selection, funding, and absence of any county official who reviews the sheriff's decisions, alters the status of Alabama's sheriffs as constitutional officers of the State who, in enforcing state law, exercise state authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* 518 (1868). Nonetheless, it was the common understanding then, as now, that the sheriff, as conservator of the peace, exercises the sovereign's authority. Likewise, the requirement that the county fund the sheriff's office does not alter this settled understanding. Traditionally, the sheriff was not financially supported by the sovereign but was still understood as exercising sovereign authority. Moreover, sheriffs are commonly assigned numerous duties, such as serving court process and subpoenas issued by state agencies and legislatures. *See, e.g.*, Ala. Code § 36-22-3(1). Adopting petitioner's view would result in the imposition of liability on the county for a sheriff's unconstitutional service of a state-issued subpoena even though the county has no authority with respect to such matters.

Finally, that Monroe County's board of commissioners does not have authority to review the sheriff's law enforcement decisions does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority

and to make sheriffs constitutional officers of the State's executive department.[2]

ARGUMENT

A SHERIFF IS NOT A COUNTY POLICYMAKER FOR LAW ENFORCEMENT PURPOSES WHERE STATE LAW DOES NOT GRANT THE COUNTY LAW ENFORCEMENT AUTHORITY AND MAKES THE SHERIFF A STATE OFFICER

In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent it had held that local governments were not suable as "persons" under 42 U.S.C. § 1983. The Court, however, rejected the view that § 1983 imposes *respondeat superior* liability, holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. After considering § 1983's text and legislative history, the Court concluded that "Congress did not intend [local governments] to be held liable unless action pursuant to official [local government] policy of some nature caused a constitutional tort." *Id.* at 691. As the Court stated, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

As explained below, the court of appeals properly recognized that in determining whether Monroe County could be held liable under § 1983 for Sheriff Tate's acts, a court must initially ask the "threshold question" of "whether the official is going about the local government's business. If the official's actions do not fall within an area of the local government's business, then the official's

[2] *Amici* note that as state officers, sheriffs are suable under § 1983 in their individual capacities, as was done here. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *see also* Pet. App. 2a.

actions are not acts of the local government." Pet. App. 8a. The court of appeals' holding that § 1983 liability does not attach because "Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, [because] Monroe County has no law enforcement authority," *id.* at 18a, is manifestly correct as a matter of statutory construction.

Petitioner asserts that "the county commission or the other parts of the county's government, [cannot] be distinguished from the county sheriff." Pet. Br. 11. Yet the Forty-Second Congress expressly rejected the very form of liability which petitioner urges this Court to impose—liability on the corporate entity of a local government where a State has not granted it authority to act, notwithstanding that the State has also created the office of a sheriff who is elected and funded by local residents. While sheriffs have frequently been called county officers, their duties involve the exercise of a wide variety of functions, many of which involve the exercise of state rather than county authority. Alabama merely follows the settled understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. Where, as here, sheriffs exercise state authority, their acts cannot "fairly be said to represent" a local government's official policy so as to establish "that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. The Court should therefore reject petitioner's attempt to impose on Monroe County and its citizens the vicarious liability which the Court rejected in *Monell*.

A. A Local Government Cannot Be Sued Under § 1983 For Unconstitutional Policies When It Has No Authority To Make Such Policies

1. Section 1983 renders liable "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The court of appeals held that

Monroe County was not suable under § 1983 because in the absence of the State having granted law enforcement authority to the County, the Sheriff could not be deemed to be "exercis[ing] county power." Pet. App. 16a. This holding is manifestly correct as a matter of statutory construction.

In concluding that § 1983's use of the term "person" included municipal corporations and local governments, the *Monell* Court relied principally on the common law understanding of the nature of the corporation and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). But while by 1871, the corporation was treated as a natural person and citizen of a State for the purposes of establishing the diversity jurisdiction of the federal courts, *see id.* (citations omitted), the corporation was always recognized as being an artificial person with only those powers which were conferred on it by its charter. *See, e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Consistent with this understanding, the Court noted shortly before the enactment of § 1983:

> A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; *the latter can do only what is authorized by its charter.*

Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65, 81 (1870) (emphasis added); *see also Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659, 666-67 (1878) ("powers and immunities" of artificial person "depend primarily upon the law of its creation").

At the time of § 1983's enactment, it was likewise settled that municipal corporations "possess no powers or

faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As Judge Dillon explained:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

Id. § 55, at 101-02. *See also* Howard S. Abbott, *A Summary Of The Law Of Public Corporations* § 21, at 20-21 (1908) (A public corporation "takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community.").[8]

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[8] A corollary of this principle is the *ultra vires* doctrine, which was also well established at the time of Section 1983's enactment. As Judge Dillon wrote in 1872:

> The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgment of the courts.

Dillon, *The Law Of Municipal Corporations* § 767, at 725. *See also* 1 Charles F. Beach, Jr., *Commentaries On The Law Of Public Corporations* § 592, at 607-08 (1893) ("Acts of municipal corporations which are done without power expressly granted, or fairly to be implied from the powers granted or incident to the purposes of their creation, are *ultra vires*.").

Today it is still the general rule that "in order to render a municipal corporation liable, the acts complained of must have been

As the Court has recognized, the members of the Forty-Second Congress were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *see also Heck v. Humphrey*, 512 U.S. 477, 483-86 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989) (collecting cases). The Court has likewise noted that § 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Burns v. Reed*, 500 U.S. 478, 484 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). These principles demonstrate that under § 1983, a local government acts as a "person" only to the extent its putative officers and agents exercise powers which the State has granted to it. A local government is thus suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is also supported by the Forty-Second Congress' endorsement of the common law principles applicable to municipal corporations in rejecting the conference committee's draft of the Sherman Amendment.[4] As the Court noted in *Monell*, the

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in the exercise of some power conferred on it by its charter or other positive enactment." 18 Eugene McQuillin, *The Law Of Municipal Corporations* § 53.60, at 379 (Stephen M. Flanagan ed., 3d ed. 1984). Likewise, with respect to the torts of a municipal corporation's officers, it "is well settled that if the alleged tort is in connection with an act which is wholly ultra vires, i.e., beyond the scope of the power of the municipality, no liability for damages arises, as against the municipality." *Id.*

[4] The conference committee's draft of the Sherman Amendment provided a cause of action against local governments to persons injured by

> any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . .

Monell, 436 U.S. at 703 (quoting Cong. Globe, 42d Cong., 1st Sess. 749, 755 (1871)). This version not only rendered local governments liable but provided the injured person with collection remedies such as attachment, garnishment and mandamus against the local government itself. *Id.* at 703-04 (quoting Cong. Globe at 749, 755). The debate focused on this version, which was added in conference after "[t]he House refused to acquiesce in a number of amendments made by the Senate, including the [original] Sherman amendment" to H.R. 320. *Id.* at 666.

Sherman Amendment—which proposed to provide a cause of action against local governments to persons injured in either their person or property by rioters or mobs acting with the intent to deprive them of their civil rights—was the subject of vigorous debate in the House of Representatives which rejected it. *See* 436 U.S. at 666-69; *see also Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 727 (1989) ("[o]pposition to the amendment . . . was vehement, and ran across party lines, extending to many" legislators who had voted for Section 1983).

The principal objection to the Amendment was that it imposed liability on local governments for failing to keep the peace even though local governments frequently had not been granted the authority to keep the peace under state law. *See Monell*, 436 U.S. at 673. Numerous lawmakers noted this infirmity in the legislation during the floor debate in the House. For example, Representative Willard stated:

> In most of the States—it is so in mine, I know—the counties and the towns have no power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of the citizens, when perhaps no laws for its protection exist; for not giving me protection when they have

> not been clothed by the State with the right and power to give me protection?

Cong. Globe, 42d Cong., 1st Sess. 791 (1871). *See also id.* at 794 (statement of Representative Poland) (counties are "[i]n a sense . . . corporations, but with only such powers and subject to such burdens as the State may deem advisable").

Representative Blair, to whom the Court in *Monell* attributed the most complete statement of opposition, *see* 436 U.S. at 673, added:

> [The Sherman Amendment] claims the power in the General Government to go into the States . . . and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot . . . tell me where its power will stop and what obligations it might not lay upon a municipality. . . . The State has made these municipalities for certain objects. It has not made them for the purpose of meeting this obligation which the Government of the United States under this bill would seek to interpose and lay upon them . . . .

Id. at 795. And of particular relevance in assessing petitioner's contention that Monroe County should be held liable for the sheriff's actions notwithstanding that the State has not granted it law enforcement authority, are the comments of Representative Burchard:

> . . . there is no duty imposed by the Constitution of the United States, or usually by State laws, upon

> a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. . . . But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Id.

As the foregoing demonstrates, the members of the Forty-Second Congress were well aware of the common law principle that counties, like cities and towns, possess only the authority which the State has vested in them. Section 1983 must be construed with this principle in mind. The subsequent rejection of the Sherman Amendment—on the ground that the Federal Government could not impose an obligation on local governments where the States themselves had not vested such authority in the local government entity—renders unassailable the conclusion that absent a grant of authority from the State to engage in a particular function, a county does not make policy so as to subject it to *Monell* liability. Put another

way, a local government is a "person" only with respect to those powers which the State has vested in it.[5]

[5] This construction of the term "person" is also supported by the common law principles applicable to the suability of county governments that derive from their historical origins as administrative arms of state governments. Unlike municipal corporations, created with the consent of their inhabitants, counties were created by the State without the consent of their citizenry and thus were considered to be "involuntary quasi corporations." Dillon, *Treatise On The Law Of Municipal Corporations* § 10, at 31 n.1. As such they were viewed as being "purely auxiliaries of the state." *Id.* at 32-33. As Judge Dillon added, "to the general statutes of the state [counties] owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." *Id.* at 33.

Counties were not suable in the same manner as municipal corporations. As Judge Dillon wrote:

> [M]any of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, [with] respect to their liability, to persons injured by their neglect of duty: holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment.

Id. See also id. at 31-32 n.1 (quoting *Hamilton County v. Mighels*, 7 Ohio St. 109, 118-24 (1857)).

Professor Cooley likewise explained that counties were not "persons" in the same manner as municipal corporations:

> The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated under general or special laws. As intimated above counties . . . are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of law peculiarly applicable to municipal corporations.

Roger W. Cooley, *Handbook Of The Law Of Municipal Corporations* § 5, at 14 (1914). *See also* Abbott, *A Summary Of The Law Of Public Corporations* § 530, at 529 ("Since the government of a quasi corporation is ordinarily imposed by the sovereign, its business and private relations simple[,] and further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations unless one is expressly imposed by statute.") (footnote omitted); *Soper v. Henry County*, 26 Iowa. 264, 268, 270 (1868); *Hedges v. County of Madison*, 6 Ill. (1 Gilm.) 567, 570 (1844).

To subject local governments, and in particular counties, to liability for functions over which they have no authority would have potentially ruinous consequences. Even today, approximately ninety-five percent of U.S. counties are general law counties which serve as administrative arms of their State with limited powers. *See* Tanis J. Salant, *County Governments: An Overview* in Advisory Commission on Intergovernmental Relations, *Intergovernmental Perspective* at 6 (Winter 1991).[6] With respect to such counties, the States retain authority to impose on them obligations to fund the performance of state functions without necessarily granting the county authority to perform the function.[7] As Justice O'Connor's opinion in *City of St. Louis v. Praprotnik* noted:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies.

485 U.S. 112, 124-25 (1988) (plurality opinion).

The States are not required by either the U.S. Constitution or Section 1983 to vest law enforcement authority in county governments. Whether they have done so is a question which, as the court of appeals recognized, must necessarily be resolved before answering the question of

[6] Even though home rule provisions have been enacted in thirty-six States, as of 1991 only 117 of 1,307 eligible counties had adopted general home rule. Salant at 6.

[7] One of the traditional functions performed by county governments is to provide courts, which are commonly presided over by county elected judges. *See* U.S. Advisory Commission on Intergovernmental Relations, *Profile Of County Government* 30 (1971). It cannot be contended that the judges of such courts are exercising county authority because the county is required to provide and maintain a courthouse. Rather, they exercise state authority even where they are elected by county residents.

whether a particular official is a county's final policymaker. *See* Pet. App. 7a-8a. It is likewise a question of state law on which, as this Court has expressly held, the courts of appeals should receive considerable deference. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). *Cf. Jett*, 491 U.S. at 738; *id.* at 738 (Scalia, J., concurring).

Here, the answer is clear. Alabama has not granted counties home rule powers but rather only narrow and defined authority. *See* Ala. Code §§ 11-3-10, 11-3-11 (listing county powers); *see also* Salant, *County Governments: An Overview* at 8. As this Court has noted, one of the main powers of Alabama county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992). Alabama county governments' other principal powers are largely limited to the erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority. *See* Pet. App. 6a-18a. The court of appeals' holding that Monroe County was not suable under § 1983 for the sheriff's "policymaking" was therefore correct as a matter of statutory construction.

2. In rejecting the court of appeals' holding that the County cannot be held liable for the Sheriff's activities because it does not have law enforcement authority, neither petitioner nor his *amici* make any attempt to reconcile their expansive view of local government liability with § 1983's text, the common understanding of its meaning, or its legislative history. Instead, petitioner and the United States rely on dictum in *Pembaur* to argue that "when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement." Pet. Br. 6; *see also* U.S. Br. 10. Petitioner asserts that "there is nothing of relevance to distinguish the Alabama sheriff in this case from the Ohio sheriff in *Pembaur*." Pet. Br. 10; *see also* U.S. Br. at 10 (asserting that *Pembaur* "approved of the court of appeals' conclusion that, under . . . a statutory scheme strikingly similar to the facts in the instant case," Ohio sheriffs made county law enforcement policy).

In *Pembaur*, however, the Court did not grant review on the question of whether Ohio sheriffs are county policymakers for law enforcement purposes. *See* 475 U.S. at 471, 476. Instead, the Court relied on the holding of the Sixth Circuit that, under Ohio law, the sheriff was the county's policymaker with respect to law enforcement activities, stating that this is "a conclusion that we do not question here." *Id.* at 484. *Pembaur* thus stands only for the discrete proposition that a single decision or act by an official vested with the authority to make local government policy could establish the existence of a policy. *See* 475 U.S. at 480-81.

Ironically, petitioner and his *amici* rely on *Pembaur*, yet ignore the Court's declaration in that case that it "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." 475 U.S. at 484 n.13. Two separate panels of the Eleventh Circuit have now studied Alabama law and each has unanimously concluded that Alabama's counties have not been granted law enforcement authority and Alabama's sheriffs do not exercise county authority when they engage in law enforcement activity. *See* Pet. App. 10a-19a; *see also Swint v. City of Wadley*, 5 F.3d 1435, 1450-51 (11th Cir. 1993), *vacated on other grounds, Swint v. Chambers County Comm'n*, 115 S.Ct. 1203, 1212 (1995). As the Court indicated in *Pembaur*, these holdings are entitled to deference.

B. In the Absence Of A Grant By The State Of Law Enforcement Authority To The County, A Sheriff Does Not Make County Policy When Enforcing State Law

Petitioner further argues that the sheriff "is commonly understood to be a county official" and that "Alabama law expresses the common understanding that the sheriff is a county-based official setting policy for the county."

Pet. Br. 20-21. Noting the derivation of the term sheriff from the Saxon words "scyre" (as in shire or county) and "reve" (for keeper), petitioner further asserts that "[t]reatises and books regarding law enforcement uniformly recognize the position of sheriff in the United States as a position with county authority." *Id.* at 20.

The authorities petitioner relies on, however, do not establish anything more than that sheriffs exercise their powers within the boundaries of a county. *See id. at* 20-21 & n.4 ("sheriff" is the "chief law enforcement officer . . . in a U.S. county") (quoting American Heritage Dictionary at 1663 (3d ed. 1992)). But this truism certainly does not answer the question of whose authority the sheriff exercises in enforcing state law. Moreover, it is impossible to reconcile petitioner's assertion that sheriffs have traditionally exercised county authority (and therefore make county policy) with the Forty-Second Congress' rejection of the Sherman Amendment on the grounds that many units of local government had not been granted authority to keep the peace. *See Monell*, 436 U.S. at 673-81; *see also supra* pp. 10-13. Indeed, it is telling that petitioner notes the Saxon derivation of the term "sheriff," while ignoring more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's and not the county's authority. *See* 1 William Blackstone, *Commentaries on the Laws of England* 339 (George Sharswood ed. 1904); Michael Dalton, *The Office And Authoritie Of Sherifs*, folios 2-3 (photo. reprint 1985) (1623).

The office of the sheriff was among those English institutions which the American colonists adopted in settling this country. *See* C.R. Wigan & Dougall Meston, *Mather On Sheriff And Execution Law* 15 (3d ed. 1935). Thus, the office was well established at the time of § 1983's enactment. *See, e.g.*, Cong. Globe at 795 (Statement of Rep. Burchard); 2 *Bouvier's Law Dictionary* 518 (1868); John G. Crocker, *The Duties Of Sheriffs, Coroners And Constables* § 1, at 1 note a (2d ed. 1871) (compiling state laws regarding the election, qualification and entering upon duty of sheriffs). It was likewise common parlance then to describe the sheriff as "a conservator of the peace within his county," Crocker, *The Duties of Sheriffs* § 25, at 18, or as "the chief executive officer of the county." Charles W. Hartshorn, *The New England Sheriff* 13 (2d ed. 1855).[8]

Sheriffs were thus required to carry out the very obligation which the Sherman Amendment would have imposed on local governments. *See* Crocker, *The Duties of Sheriffs* § 25, at 18; Perley, *The Maine Civil Officer* at 51-53; James Ewing, *A Treatise On The Office and Duty Of A Justice Of The Peace, Sheriff, Coroner, Constable, And Of Executors, Administrators, And Guardians* 538 (3d ed. 1839); Hartshorn, *The New England Sheriff* at 239-42; *The Conductor Generalis* at 377. Moreover, in performing the duty to preserve the peace, the sheriff was authorized by both statutory and common law to invoke the *posse comitatus*, that is, to require the adult citizens of the county to assist in the suppression of riots and the apprehension of criminals. 1 Anderson, *A Treatise On The Law Of Sheriffs* § 141, at 137-39, § 143, at 139; Charles R. Morrison, *Justice And Sheriff* 430 (1872); *The Conductor Generalis* at 377; Perley, *The Maine Civil Officer* at 52-53; Hartshorn, *The New England Sheriff* at

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[8] *See also* 2 *Bouvier's Law Dictionary* at 518; Edward R. Olcott & Henry M. Spofford, *The Louisiana Magistrate, And Parish Officer's Guide* 208 (1848); Jeremiah Perley, *The Maine Civil Officer* iii-iv (1825); *The Conductor Generalis: Or, The Office, Duty And Authority Of Justices Of The Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-Men, And Overseers Of The Poor* 377 (1801).

That sheriffs are frequently termed "county officers" does not alter the source of the authority they exercise. As one of the authorities cited by petitioner notes, "[a]s a general rule, the sheriff answers to the attorney general for his activities even though the constitutions and statutes list him as a county officer with his compensation provided by the governing body in the particular county." George T. Felkenes, *The Criminal Justice System: Its Functions And Personnel* 55 (1973).

239-42; Blackstone, 1 *Commentaries On The Laws Of England* at 343.

Notwithstanding the duties and extraordinary powers of the sheriff's office, the members of the Forty-Second Congress rejected the Sherman Amendment on the ground that it imposed on local governments the obligation to keep the peace *when they had no such authority under state law*. *See supra* at 10-13. The only plausible explanation for this is that, at least when enforcing state law, the sheriff exercised the authority of the sovereign itself and not the county. Contrary to petitioner, this was, and remains, the common understanding of the source of the sheriff's authority. *See* 1 Anderson, *A Treatise On The Law of Sheriffs* § 6, at 5 ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State."); Cooley, *Handbook Of The Law Of Municipal Corporations* § 170, at 512 ("Sheriffs . . . and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county[.]"); 2 *Bouvier's Law Dictionary* at 518 (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").[9]

Sheriffs were commonly constitutional officers of the State, *see, e.g.*, Crocker, *The Duties Of Sheriffs* § 1, at 1 & n.1; La. Const. art. 83 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 310); Hartshorn, *The New England Sheriff* at 14; Ewing, *Office And Duty*

[9] The understanding in this country that sheriffs exercise state authority is simply a continuation of the common law understanding. Blackstone described the sheriff as "do[ing] all the king's business in the county," 1 *Commentaries On The Laws Of England* at 339, and noted that "[a]s the keeper of the king's peace," the sheriff "may apprehend, and commit to prison, all persons who break the peace . . . and may bind any one in recognizance to keep the king's peace" and is "to defend his county against any of the king's enemies." *Id.* at 343 (footnote omitted).

at 513; Perley, *The Maine Civil Officer* § 1, at 2, and remain so in several States today. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27; Md. Const. art. IV, § 44; *Rucker v. Harford County*, 558 A.2d 399, 401-02 (Md. 1989). Before entering upon the duties of the office, the sheriff was commonly required to enter into a surety bond with the State "for the faithful execution of [the] office." Ewing, *Office And Duty* at 514; *see also* 2 Anderson, *A Treatise On The Law Of Sheriffs* at 709; Crocker, *The Duties of Sheriffs* at 503; Hartshorn, *The New England Sheriff* at 15; Perley, *The Maine Civil Officer* at 3. Sheriffs were also commonly subject to removal from office through either the State's impeachment procedure or removal by the governor, or both. *See* Crocker, *The Duties of Sheriffs* § 10, at 8-9; Hartshorn, *The New England Sheriff* at 7; La. Const. art. 88 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 311); Perley, *The Maine Civil Officer* at 7; Ala. Const. art. VII, §§ 173-74; 2 *Bouvier's Law Dictionary* at 518.

As the foregoing demonstrates, sheriffs traditionally have been viewed as being state officers who exercise the State's sovereign authority. This was likewise the understanding of the Forty-Second Congress. It remains the case in Alabama. There sheriffs are constitutional officers of the State's executive department, *see* Ala. Const. art. V, § 112, who are required to investigate violations of law "whenever directed to do so . . . by the attorney general or governor," Ala. Code § 36-22-5, and must submit written reports "under oath . . . on any subject, relating to the duties of their . . . offices," when required by the Governor. Ala. Const. art. V, § 121.

Moreover, under the Alabama Constitution, sheriffs are subject to impeachment for the same offenses (including the willful neglect of their duties) as are other state officials such as the Governor and Attorney General, and are categorized with the State's judges for purposes of im-

peachment.[10] *See id.* § 112; art. VII, §§ 173-74. Consistent with the view that Alabama sheriffs exercise state authority, the Governor has been empowered to initiate an impeachment proceeding against the sheriff which is prosecuted by the Attorney General and heard by the state Supreme Court.[11] *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). Alabama's sheriffs thus are at all times ac-

[10] Art. VII, § 174 of the Alabama Constitution provides:

> The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law.

Impeachment of county officials is dealt with separately, and by different procedures. *See id.* at § 175. The assertion of *amicus* ACLU that the "manner of impeachment for sheriffs is the same as for virtually every county official," Br. *Am. Cur.* at 11, is thus erroneous. The ACLU's further assertion that sheriffs may not be impeached for "adopting law enforcement policies other than those preferred by the Governor or other state officials," *id.*, is unsupported by any decisional law. The ACLU does not explain why a sheriff, as a subordinate officer in the State's executive branch, who failed to follow orders from the Governor or Attorney General to conduct law enforcement activities in a particular manner, would not have engaged in the "[w]illful neglect of duty." Ala. Code § 36-11-1(b). *See State v. Jinwright*, 55 So. 541, 541-42 (Ala. 1911) (impeaching sheriff for neglect of duty, noting his failure to execute "[t]he Governor['s] . . . positive orders to place a guard at the jail and protect the prisoner at all hazards").

[11] Impeachment proceedings have been invoked on numerous occasions. There are five reported instances in which the State has sought to impeach sheriffs. *See State v. McPeters*, 56 So.2d 102 (Ala. 1951); *State v. Baggett*, 41 So.2d 584 (Ala. 1949); *State v. Jinwright*, 55 So. 541 (Ala. 1911); *State v. Latham*, 61 So. 351 (Ala. 1910); *State v. Cazalas*, 50 So. 296 (Ala. 1909). These decisions do not represent the total number of impeachment proceedings because the Alabama Supreme Court stopped issuing opinions in these cases more than forty years ago. *See McPeters*, 56 So.2d at 103-04. Nor do they account for those instances in which sheriffs

countable to state authority. This stands in stark contrast to the procedure used for the removal of county officers, such as members of the board of commissioners and other local officials, which provides for a jury trial in various "court[s] of the county in which such officers hold their office," Ala. Const. art. VII, § 175, and effectively vests removal authority in the local populace.

None of the factors which petitioner and his *amici* rely upon to argue that the sheriff exercises county authority, *e.g.*, the method of selection, funding, or jurisdiction of the office, alters the fact that Alabama's sheriffs are constitutional officers of the State who, in enforcing state law, exercise state authority. Contrary to the assertion that because sheriffs are elected by the residents of a county they exercise county authority, *see* Pet. Br. 20; U.S. Br. 17, the selection of the sheriff through popular elections does not alter the nature of the office's authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* at 518. *See also* Crocker, *The Duty Of Sheriffs* § 1, at 1; Ewing, *Office And Duty* at 513; Olcott & Spofford, *The Louisiana Magistrate* at 208; *see also* Cong. Globe at 795 (Rep. Burchard). But as the members of the Forty-Second Congress recognized, sheriffs did not exercise the authority of their counties but rather that of their States.[12]

have resigned their offices when threatened with impeachment proceedings or criminal indictment.

While the United States grudgingly acknowledges that Alabama sheriffs are impeached "at the state level," it makes the unpersuasive suggestion that "the county's power to vote its sheriff out of office is a more realistic measure of control." U.S. Br. at 18 n.8. Unlike an election which occurs only at four year intervals, *see* Ala. Const. art. V., § 138, an impeachment can be initiated at any time. Impeachment proceedings are rarely initiated against federal officials. Impeachment nonetheless remains a "realistic" and effective control against malfeasance by federal officials.

[12] In many States, judges are elected by the voters of districts whose boundaries are coterminous with county lines. *See, e.g.*, Ariz. Rev. Stat. § 12-120.02 (court of appeals); Ga. Code Ann.

Petitioner's position is also refuted by the Alabama Constitution's empowerment of the Governor to require sheriffs to provide "information in writing, under oath, . . . on any subject, relating to the duties of their respective offices," and making the failure to do so, or willful filing of a false report, an impeachable offense. Ala. Const. art. V, § 121. It is further refuted by statutes requiring the sheriff to conduct special investigations when directed by the Governor or Attorney General, *see* Ala. Code § 36-22-5, and requiring sheriffs to follow the direction of the Governor upon issuance of a writ of special election. *See id.* § 17-18-3. Alabama law thus conclusively demonstrates that sheriffs are state officers who exercise the authority of the State itself and not the county.

Petitioner and the United States also place much stock in provisions of Alabama law which require that counties pay the salary and expenses of the sheriff. *See* Pet. Br. 9-10, 15-16, 18; Br. *Am. Cur.* U.S. 15-17. But the fact that Alabama, as an administrative matter, imposes on its counties these "duties and responsibilities in regard to law enforcement by the county sheriff," U.S. Br. 15, does not establish that the State has granted its counties law enforcement authority. Rather, this argument erroneously equates the county's funding obligations with a grant of law enforcement authority. It ignores that sheriffs' salaries are set by state law, *see* Ala. Code § 36-22-16(a), a provision which is inconsistent with the notion that counties exercise law enforcement authority.[13] It also ignores

§§ 15-6-1; 15-7-20 (trial courts); Kan. Stat. Ann. § 20-301 (trial courts); Mont. Code Ann. § 3-5-201 (trial courts); 42 Pa. Cons. Stat. §§ 901, 3131 (court of common pleas). These judges no more exercise county authority by virtue of their election by county residents than do sheriffs.

[13] The United States erroneously asserts that Ala. Code § 36-22-16(a) "makes clear that the county . . . has the authority to provide a higher salary 'by law by general or local act.'" U.S. Br. at 16 (quoting Ala. Code § 36-22-16(a)). The terms "general or local act" do not, however, refer to county ordinances but rather categories of legislation enacted at the state level. *See* Ala. Const. art. IV, § 110 ("a general law . . . is a law which applies to the whole

that a sheriff can sue the county commission if it does not provide adequate funds for his office and activities. *See Etowah County Comm'n v. Hayes,* 569 So.2d 397 (Ala. 1990).[14]

Petitioner's argument that the county's funding obligations equate with a grant of authority to the county proves too much because the States, including Alabama, have long vested in their sheriffs numerous duties, many of which unquestionably involve the exercise of state authority. As one leading treatise explains:

> [I]t is his duty, when required, to execute all criminal process, judgments and orders of every court or officer having criminal jurisdiction in this state. . . . He is also required to serve the subpoenas of district attorneys of other counties, upon witnesses in his own county . . . .
>
> In civil matters, the sheriff is the immediate officer of every court of record in the state . . . to whom all writs and process are regularly directed, and he is bound to execute the same. He is to serve the writ or order for arrest, and take bail, summon the jury, and through him the court enforces obedience to its orders and punishes for contempts; and when

state; a local law is a law which applies to any political subdivision or subdivisions of the state less than the whole"). Moreover, the Alabama legislature is constitutionally prohibited from granting a county authority to "increase or decrease the fees and compensation of [public] officers during their terms of office." *Id.* § 68.

[14] The source of the office's funding is not probative of the source of the sheriff's authority. Sheriffs traditionally were funded not by the sovereign but by county residents through the imposition of fees and taxes. 2 Anderson, *A Treatise On The Law Of Sheriffs* § 706, at 673; *see also* George Atkinson, *A Treatise On The Offices Of High Sheriff, Undersheriff, Bailiff* 267 (6th ed. 1878); Morrison, *Justice And Sheriff* at 371; Perley, *The Maine Civil Officer* at 69-74.

Notwithstanding that the sheriff's office was funded by residents of the county, the sheriff clearly exercised the authority of the sovereign. *See* 1 Blackstone, *Commentaries On The Laws Of England* at 339, 343-44.

> a cause is determined, he sees that the judgment of the court is carried into effect. He may hold courts to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and to inquire into any claim of property seized or levied on by him . . . .

Crocker, *The Duties Of Sheriffs* §§ 25-26, at 18-19; *see also* Olcott & Spofford, *The Louisiana Magistrate* at 215-51; Hartshorn, *The New England Sheriff* at 18-24, 36-277; Ewing, *Office and Duty* at 519-42; Perley, *The Maine Civil Officer* at 25-68.

In Alabama, the sheriff's duties are equally broad in scope. Thus, in addition to "ferret[ing] out crime," Ala. Code § 36-22-3(4), the sheriff must "execute and return the process and orders of the courts of record of th[e] state and of officers of competent authority . . . ." *Id.* § 36-22-3(1). The sheriff is also required to attend the various courts "held in [the] county" and "obey the lawful orders and directions of such courts." *Id.* § 36-22-3(2). If petitioner is correct in his assertion that the county's funding of the office of the sheriff establishes that the county has law enforcement authority, then it likewise establishes that the county exercises authority with respect to the execution and return of the process issued by the State's courts, its agencies and officials, or in the carrying out of other judicial orders.

But it can hardly be the case that a sheriff makes county policy when he unconstitutionally enforces an injunction or writ of attachment in a civil matter between private parties. Nor can it be the case that a sheriff makes county policy when he unconstitutionally serves a subpoena issued by a state agency or legislature. The county, being an artificial person with only those powers granted to it by the State, *Fertilizing Co.*, 97 U.S. at 666-67; *Railroad Co.*, 79 U.S. (12 Wall.) at 81; Dillon, *The Law Of Municipal Corporations* § 9, at 29, has no authority over such matters, *see* Ala. Code § 11-2-11, and cannot reasonably be viewed as having any policy with respect thereto.

Likewise, under Alabama law, law enforcement is simply not within a county's authority. That the State assigns its sheriffs a jurisdictional boundary on the basis of county lines as a matter of tradition and administrative convenience is of no relevance in determining whether the corporate entity of the county exercises law enforcement authority.[15]

There is thus no merit to the contention that Alabama's sheriffs make county policy because "their decisions are final and unreviewable" within their counties. Pet. Br. 10; U.S. Br. 13. That Monroe County's board of commissioners or its other officials do not have the authority to review the decisions of the sheriff does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law en-

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[15] Petitioner and his *amicus* ACLU also point to the existence of the Alabama Highway Patrol to suggest that sheriffs must exercise county authority. Pet. Br. 24; *see also* Br. *Am. Cur.* ACLU 8 (arguing that "Alabama . . . clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol, and county law enforcement authority, which is exercised by county sheriffs").

The suggestion that the existence of the state police renders the sheriff a county policymaker (who exercises county authority) is, however, a non sequitur and is refuted by more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. *See supra* pp. 18-20. Consistent with this understanding, Alabama has made its sheriffs constitutional officers of the State's executive department subject to impeachment at the initiation of the Governor and Attorney General.

The comparatively recent creation of state police forces (a post-World War I development) does not alter this understanding. That the advent of the automobile and its attendant problems, *i.e.*, traffic safety and theft, and the ease with which criminals could cross jurisdictional boundaries, *see* John A. Humphrey & Michael E. Milakovich, *The Administration Of Justice: Law Enforcement, Courts, and Corrections* 42 (1981), led States such as Alabama to establish state police forces, does not alter the source of the sheriff's authority. The States are not prohibited from vesting law enforcement authority in more than one institution of state government.

forcement authority and to make sheriffs constitutional officers of the State's executive department. Sheriffs could hardly vindicate the State's sovereign interests if their activities were subject to review by local officials.

It is simply erroneous to suggest, as the United States does, that the sheriff acts with "county power" because "state law identifies no other official or entity as authorized to make final policymaking decisions over law enforcement in a particular county" or that no "official with statewide jurisdiction supervise[s] the sheriff in the exercise of his law enforcement authority." U.S. Br. at 12-13. The relevance of these factors in determining whether an official acts with state or county authority is not immediately clear. Indeed, officials such as the Governor and Attorney General (and many federal officials) are ordinarily subject to "supervision" only through such mechanisms as legislative oversight and impeachment.

In any event, the Alabama Constitution gives the Governor and Attorney General the power to supervise and discipline errant sheriffs through their authority to institute impeachment proceedings and require sworn written reports on their activities. *See supra* pp. 21-23. Likewise, the Alabama Constitution vests "[t]he supreme executive power of th[e] state" in the Governor, Ala. Const. art. V, § 113, and necessarily grants the Governor authority over subordinate officers such as sheriffs. *See id.* § 112. Indeed, in *State v. Jinwright*, the Alabama Supreme Court impeached a sheriff for failing to prevent a lynching, in part because "[t]he Governor had given him positive orders to place a guard at the jail and protect the prisoner at all hazards." 55 So. at 541. It is thus strange to suggest that a sheriff, as a subordinate officer, who failed to obey the Governor's lawful orders would not risk impeachment for the willful neglect of duty.

Finally, petitioner's suggestion that "if states could insulate their counties from liability simply by designating sheriffs and others who operate on the local level as 'state officials,' § 1983 would certainly and easily be

thwarted," Pet. Br. 26, *see also* Br. *Am. Cur.* ACLU at 14, is mistaken for several reasons. First, Alabama has done far more than label its sheriffs as state officials. Rather, as discussed above, it has made them accountable to the State by subjecting them to an impeachment procedure initiated by the Governor and Attorney General and adjudicated by the state Supreme Court, as well as through other mechanisms.

Second, Alabama has not made its sheriffs state officials in order to insulate counties from § 1983 liability. As the Alabama Supreme Court's opinion in *Parker* explains, the State's constitutional provisions which made sheriffs executive officers of the State and subjected them to impeachment were enacted in 1901, sixty years before this Court revived § 1983 in *Monroe* and nearly eighty years before *Monell* overruled *Monroe* with respect to the suability of local governments as "persons" under the statute. *See* 519 So.2d at 443-44. Indeed, the impeachment power was vested in the State itself—a change from the prior practice—for the very purpose of preventing egregious conduct which unquestionably violated constitutional norms. *See Jinwright*, 55 So. at 542 (impeaching sheriff and noting "[i]t is vain for us to write in our Constitution . . . that all persons accused of crime shall have the right to a 'public trial, by an impartial jury,' and shall not 'be deprived of life, liberty, or property, except by due process of law,' if our government cannot or will not enforce it").

Third, affirmance of the court of appeals' decision does not "thwart" the intent of the Forty-Second Congress or the purpose of § 1983. *See* Pet. Br. 13. To the contrary, as explained above, the Forty-Second Congress specifically rejected the imposition of liability on local governments where the States had not granted them authority to act. *See supra* pp. 10-13. Likewise, the Forty-Second Congress specifically rejected the imposition of liability on the States themselves. *See Will*, 491 U.S. at 71. Consistent with these principles, it rejected the imposition of

Sherman Amendment liability on county governments notwithstanding the existence of the sheriff's office because it recognized that in enforcing state law, sheriffs exercised state and not county authority. *See supra* 12-13. Petitioner's objection, then, is to the failure of the Forty-Second Congress to subject the States to suit under § 1983.

Finally, as a leading authority has noted, "states do not order their affairs with future federal litigation in mind, but with a practical appreciation for what seems workable and appropriate." Charles F. Abernathy, *Civil Rights And Constitutional Litigation* 349 (2d ed. 1992). Alabama has a long tradition of limited government and particularly limited county government. That it adheres to this tradition by granting its counties only limited powers and retaining law enforcement authority in the state executive branch is a choice which it is entitled to make. Adopting petitioner's expansive notion of liability is especially unjustifiable in light of the solicitude for the structure of state and county governments which the Forty-Second Congress showed in rejecting the Sherman Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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